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No. 91-689

In The

Supreme Court of the United States

October Term 1991

CITIBANK, N.A.,

Petitioner,

vs.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Pursuant to this Court's Rule 15.1, we point out that Petitioner's statement of the question presented is erroneous. Petitioner's statement asserts that the Philippine decree prevented its Manila branch from repaying WFAL's deposits, but this is incorrect. Philippine law merely requires Citibank to seek permission to repay, and only applies to its Manila branch assets. As this Court held, Philippine law does not prevent Citibank from repaying the deposits with its non-branch assets. 495 U.S. 660, ___, 110 S.Ct. 2034, 2039 (1990). Accordingly, the questions actually presented are these:

1. In the absence of an agreement to the contrary, where the application of state law provides that Citibank's obligation to repay WFAL's deposits is not limited to its branch assets, is there existing federal law that preempts the enforcement of state law and, if not, should this Court, rather than Congress or the Federal Reserve Board, decide whether to create federal law that would retroactively relieve Citibank of liability for its failure to repay the deposits.

2. When the Court of Appeals' alternative holding is based upon an independent state ground, should this Court undertake to create or find federal law, when it is clear that this action would not alter the outcome of this case?

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BRIEF FOR RESPONDENT IN OPPOSITION[1]

When this case was last before this Court, the Chief Justice observed:

> Upon reading the opinion of the Court in this case, one may fairly inquire as to why certiorari was granted. The opinion decides no novel or undecided question of federal law, but simply recanvasses the same material already canvassed by the Court of Appeals and comes to a different conclusion than that court did. I do not believe that granting plenary review in a case such as this is a wise use of our limited judicial resources.

Citibank, N.A. v. Wells Fargo Asia Ltd., 495 U.S. 660, ___, 110 S. Ct. 2034, 2042 (1990) ("WFAL S. Ct.")[2] App. 25a.[3] Indeed, the initial issue put to Judge Bork at the oral argument concerned the observation that the Court does

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[1] Pursuant to Rule 29.1, WFAL lists the following related corporations. Wells Fargo & Company is the parent of respondent. Its stock is publicly traded. The only arguable subsidiaries or affiliates whose stock may be publicly held are Shanghai Commercial Bank and Harpur Holdings, Ltd.

[2] We refer to the two opinions of the district court, 660 F. Supp. 946 (S.D.N.Y. 1987) and 695 F. Supp. 1450 (S.D.N.Y. 1988), as WFAL I and WFAL II, respectively. The two opinions of the Court of Appeals, 852 F.2d 657 (2d Cir. 1988) and 936 F.2d 723 (2d Cir. 1991), are designated WFAL 2d Cir. I and WFAL 2d Cir. II, respectively.

[3] "App." refers to the Appendix to the Petition; "Resp. App." refers to the Appendix to this Opposition; "Pet." refers to the Petition; and "J.A." refers to the Joint Appendix filed February 20, 1990 with this Court in WFAL S. Ct. In each case, page numbers follow.

not usually review these kinds of "factual determinations." Transcript of Oral Argument, No. 88-1260 (March 19, 1989) (hereinafter "March 19, 1989 Tr.") 4-5.[4] There is even less reason to review this case a second time.

There is nothing in Citibank's latest petition which makes this appeal certworthy. This is a simple contract dispute between private parties governed by New York law. The latest Court of Appeals opinion cures the infirmities of the earlier appellate decision. This Court previously reversed the Court of Appeals on the basis that "the factual premise on which the Second Circuit relied in deciding the case contradicts the factual determinations made by the District Court, determinations that are not clearly erroneous." App. 18a. On remand, the Court of Appeals once again unanimously affirmed the judgment in WFAL's favor, although this time "substantially for the reasons [the trial court] stated." WFAL 2d Cir. II, App. 7a-9a. Accordingly, the latest Court of Appeals decision is in complete harmony with the trial court's findings.

No one disputes any longer that "Philippine law does not bar the collection of WFAL's deposits from the general assets of the Citibank in the State of New York." App. 19a. Nor does this case raise any novel or undecided issue of federal law. Citibank's obligation to repay is not limited to the assets of the Manila branch, and its failure to repay would not be excused even if these assets were

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[4] At least one scholar reached a somewhat similar conclusion when commenting on this Court's prior decision: "[a]re all of these foreign branch sovereign-risk-to-deposit cases fundamentally first year law school contracts cases?" E. Symons and J. White, *Banking Law* 781, 788 (3d Ed. 1991).

blocked. Put another way, state law permits collection of the debt in New York and nothing in the contract varies that law.

To evade this result, Citibank invites the Court to create a new federal common law, a jurisprudential enterprise properly limited to the most extraordinary of situations. This is not one of them. As the Court of Appeals concluded, there is no inconsistency between state law and the federal policies invoked by Citibank. Citibank contends "that there is a clear federal policy placing the risk of foreign-law impediments to repayment on the depositor." WFAL 2d Cir. II, App. 9a. However, the provisions of the federal regulations upon which Citibank relies do not even purport to govern the terms of the legal relationship between banks and their depositors, including the allocation of sovereign risk. Rather, they expressly provide that allocation of risk is determined by the agreements between the parties. *Id.* at App. 10a.

In any event, there is no need to answer Citibank's call for federal common law. The Court of Appeals found an independent basis for judgment in WFAL's favor, which moots the so-called "federal" question. The Philippine moratorium, MAAB 47 (the "Decree"), *see* J.A. 145-157, does not flatly prohibit repayment of deposits; it merely requires prior approval of the Philippine Central Bank. Citibank failed to seek such approval. It now argues that it should be excused from that failure on the speculation that approval would have been denied if sought. However, the Court of Appeals held that under applicable law Citibank's failure precludes it from invoking the doctrine of impossibility to relieve it from repayment. WFAL 2d Cir. II, App. 11a.

The Court of Appeals also took note of recent evidence (undisputed by Citibank) which belies Citibank's claim that the Philippine government would have withheld approval. Over the last several years, Citibank has sought, and *received*, approval enabling it to transfer over $160 million[5] in Philippine assets as "profits" from its Manila branch to its home office. WFAL 2d Cir. II, App. 10a-11a; Resp. App. 1a. Citibank not only failed to reveal these facts when the case was last before this Court, it fails to mention them in its petition even though these developments were important to the Court of Appeals' decision.

Nothing in petitioner's essay about federal common law can disturb this aspect of the Court of Appeal's holding. Even if this Court were to create a new federal common law limiting Citibank's repayment obligation to its Philippine assets, Citibank's failure to seek approval to repay with these assets eviscerates its "impossibility" defense. This Court does not ordinarily review judgments based on an independent state ground. *Henry v. State of Mississippi*, 379 U.S. 443, 446 (1965). The case is fact-bound. No federal question is presented and the petition should be denied.

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[5] While the Court of Appeals' opinion refers to *at least* $25 million in Citibank's repatriated profits from 1984-1989, the actual figure is over $160 million for this period. See Resp. App. 1a.

STATEMENT OF THE CASE

In June of 1983, WFAL placed two $1 million (U.S.) deposits with Citibank, N.A. which were booked at Citibank's Manila branch. J.A. 19, 20. Before the deposits matured, the Philippine government issued the Decree which, according to Citibank, appeared to prevent it from liquidating loans it had made to Philippine borrowers and using the proceeds to repay deposits without obtaining Central Bank approval. WFAL I, App. 54a. Citibank then refused to repay, arguing that its depositors "understood" that its repayment obligation was limited to the assets of its Manila branch.

As the trial court observed, however, Citibank "must have known that its depositors were not taking any sovereign risk, or didn't think they were." J.A. 36; *see also* J.A. 314-316. Citibank "jealously guarded – almost like a trade secret – its belief that everybody was taking sovereign risk." J.A. 37; *see also* J.A. 262-264 (Howard); J.A. 246-248 (Schmidt). The interest rate paid by Citibank in Manila was the same as that paid at less risky locations, such as London and Frankfurt. WFAL I, App. 60a. Expert witnesses called by both Citibank and WFAL testified that this interest rate did not include any premium for sovereign risk. J.A. 271-272 (Dufey); J.A. 377-378 (Giddy). When Citibank finally informed its depositors of its position after the Decree was imposed, they reacted, in Judge Knapp's words, with "outrage and despair." J.A. 354.

The 1986 trial proceeded in reliance on Citibank's representation that the Decree had "frozen" its Philippine assets. Citibank repeated this statement to both the Court of Appeals and to this Court. *See, eg.*, Citibank November

16, 1987 2d Cir. Brief 10-12; Citibank January 25, 1989 Petition 5-6.

Last fall, for the first time, WFAL discovered that this statement is untrue. Audited financial statements of Citibank's Manila branch from 1985 through 1989 disclose that the Manila branch has transferred to its home office as "profits" over $160 million of the very assets Citibank has been claiming are "blocked" by the Decree.[6] When confronted with this information, Citibank admitted to the Court of Appeals that the branch has remitted "profits" of over $160 million to the home office. *See* WFAL 2d Cir. II, App. 11a; Citibank December 5, 1990 Reply Brief 19-20 n. 18; *see also* Citibank February 4, 1991 Memorandum 2, 5-6.

Unaware of Citibank's secret scheme of profit repatriation, the district court concluded that (1) "New York law should be used to evaluate Wells Fargo's contention that Citibank's *worldwide* assets are available for repayment," WFAL II, App. 44a (emphasis added), (2) since there was no agreement limiting Citibank's obligation to repay to the use of Philippine assets, as a matter of New York law "Citibank is liable for the debt of its Manila branch and plaintiff is entitled to look to Citibank's worldwide assets for satisfaction of its deposits," WFAL II, App. 47a, and (3) "having failed to request approval, Citibank's impossibility defense must fail." WFAL II, App. 47a.

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[6] The financial statements had been filed by Citibank with the Philippine Securities and Exchange Commission. Respondent's exhibit at Resp. App. 1a summarizes the results shown on these statements.

The Court of Appeals affirmed the trial court's holding. WFAL 2d Cir. I, App. 27a. However, as this Court noted, it was ". . . unclear from the opinion of the Court of Appeals which law it found to be controlling." WFAL S. Ct., App. 23a-24a. Accordingly, this Court ". . . decide[d] to remand the case for the Court of Appeals to determine which law applies, and the content of that law," *id.*, App. 24a, and more specifically whether the trial court was correct in holding that ". . . collection [from Citibank's general assets] is permitted . . . by rights and duties implied by law." *Id.*, App. 23a.[7]

In short, the Court of Appeals has now concurred in the trial court's conclusions "substantially for the reasons [the trial court] stated," both that New York law is controlling and that this law provides that a "parent bank is ultimately liable for the obligations of [a] foreign branch." WFAL 2d Cir. II, App. 7a-9a. This conclusion is amply supported by precedent. *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, *cert. denied*,

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[7] Justice Stevens dissented, indicating that in his view the law on this subject is quite clear. Noting that Citibank had conceded it was obligated to use non-Philippine assets if the Philippine branch could not pay because of "insolvency . . . or by an act of God," and that "Citibank argues that only the so-called 'sovereign risk' is excluded from its undertaking to repay the deposits out of its general assets," Justice Stevens wrote that, "[i]n my opinion such a specific exclusion from a general undertaking could only be the product of an express agreement between the parties. The District Court's finding that no such specific agreement existed is therefore dispositive for me." WFAL S. Ct., App. 25a-26a. The latest Court of Appeals opinion is in agreement with this approach. WFAL 2d Cir. II, App. 10a.

469 U.S. 966 (1984), citing *Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 145 N.E. 917 (1924). *Accord, Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 2602 (1990); *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982). Thus, where, as here, a foreign sovereign prevents or restricts a branch from using its assets to repay, the bank remains obligated to do so (absent an explicit agreement to the contrary). For, as noted by Justice Cardozo when addressing an earlier claim by Citibank,

> If [Citibank's] defense were to prevail, the loss sustained by [Citibank] through [its] unfortunate investments [in Russia] would be shifted from itself and cast on its depositors.

Sokoloff v. National City Bank of New York, 239 N.Y. 158, 145 N.E. 917 (1924). Citibank does not challenge these holdings or even discuss the *Sokoloff* case; Citibank, therefore, admits that WFAL may collect these deposits under state law.

On appeal, Citibank advanced a new argument that "clear federal policy" demands that federal common law be created that would retroactively excuse repayment and put sovereign risk on the depositor. The Court of Appeals declined, noting that under federal banking regulations, the status of a deposit (*i.e.*, whether it is to be exempt from reserves, insurance assessments and the like because it is "payable only outside the United States") depends upon whether ". . . the depositor is entitled, *under the agreement with the institution*, to demand payment *only* outside the United States." (Court's emphasis.) WFAL 2d Cir. II, App. 10a. The Court of Appeals then

concluded that as long as state law does not restrict the parties' ability to allocate risk by agreement, there is no "significant conflict" between state law and federal policy "such as would be necessary to justify the creation of a federal common law." *Id.*, citing *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31 (1977).

REASONS FOR DENYING THE WRIT

In its most recent Petition, Citibank continues to argue in the alternative that (a) there is an existing federal law contained "in numerous federal statutes and regulations" that "preempts" local law and that limits its repayment obligation to the assets of its Manila branch, or (b) if there is no such existing law, this Court should reach out and create new federal "common law" that would limit its obligation. Section I shows that there is no such existing law. Section II shows that there is no conflict between federal law or policy and state law which would warrant either preemption or the creation of federal common law. Finally, Section III shows that Citibank's "impossibility" defense must necessarily fail – regardless of whether Citibank's obligation is limited to its Philippine assets – since it is now clear that Citibank has been transferring profits from Manila to its home office, while steadfastly refusing to seek permission from the Philippine Central Bank to use those same assets to repay its creditors.

I. No Existing Federal Statute Or Regulation Establishes A Preemptive Rule Requiring Depositors In A Foreign Branch Of A United States Bank To Bear The Risk That The Foreign Government Will Freeze The Branch's Investments.

We begin with the simple proposition that deposit accounts are simply loans by depositors to banks, which are governed by traditional rules of local contract law. *See, e.g., Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944). As both lower courts held, where the foreign government has not frozen or seized *WFAL's deposit*, but rather adopted a rule affecting *Citibank's assets*, local law, as stated in *Sokoloff* and *Perez*, requires repayment by Citibank in New York. WFAL 2nd Cir. II, App. 8a-9a. Since this has been the law for decades, if Congress ever wanted to displace this law with a preemptive federal rule, it would have done so.

There is a strong "presumption against finding preemption of state law in areas traditionally regulated by the States." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). The contractual relationship between a bank and its depositor has long been governed by state law. Even national banks

> are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws.

First National Bank of Louisville v. Kentucky, 76 U.S. (9 Wall.) 353, 362 (1870).

Although Citibank repeatedly asserts there is an existing federal statute or regulation that limits its repayment obligation to its Philippine assets, *it fails to cite any authority in support of that claim.* Its failure to do so is not surprising. There is no existing federal statute or regulation that purports to govern this aspect of the contractual relationship between bank and depositor.

When asked by Justice White whether "the Federal Reserve Board would have the authority to put out a regulation to this effect," having "the force of law," Assistant Solicitor General Merrill replied:

> It's unclear, Justice White, and that proposition has never been tested. The Federal Reserve has broad authority over branch banks in foreign governments. . . . And it is conceivable that the statutory authority would be broad enough to justify the issuance of a preemptive rule. *But it is not the understanding of the Federal Reserve that it has at this point issued such a rule.*

March 19, 1989 Tr., 30-31 (emphasis supplied).

Notwithstanding the government's concession, Citibank continues to search for a preemptive law, and seizes upon portions of various federal statutes, regulations and rulings which deal with reserve requirements and deposit insurance. Citibank relies upon a portion of the Federal Reserve Act, 12 U.S.C. § 461(b)(6), and a portion of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(*l*)(5)(A), which exempt deposits "payable only outside . . . the United States" from reserve requirements and the deposit insurance program. These statutes do not purport to allocate risk. Similarly, none of the regulations, Board interpretations or staff opinions cited by Citibank establishes rules governing the allocation of risk in deposit contracts.

These regulations and interpretations were issued pursuant to authority granted under the Federal Reserve Act, and simply provide rules for determining whether deposit contracts trigger reserve requirements. As the Court of Appeals held, "Citibank's reliance on these provisions is misplaced." WFAL 2d Cir. II, App. 9a-10a. In each case, these rules specify that whether reserves are required is determined by looking at the terms of the deposit contract: they do not purport to dictate those terms. *See, e.g.*, 12 C.F.R. § 204.2(t) (one must look to the depositor's "agreement with the institution" to determine whether the deposit is payable outside the United States and thus exempt from reserves); 12 C.F.R. § 204.128(c) (even if a deposit purports to be payable outside the United States, reserves are required if under its agreement with the depositor the bank has "guaranteed" repayment at the home office); 35 Fed. Reg. 2,768 (1970) (same); 1 Fed. Res. Reg. Serv. at 2-330 (Staff Op., Feb. 23, 1982) (same); *id.* at 2-521.1 (erroneously cited by Citibank as 2-330.01) (Staff Op., March 21, 1983) (same); *id.* at 2-330.1 (Staff Op., July 29, 1983) (same).[8]

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[8] Citibank also relied heavily on a 1918 legal opinion issued by the then General Counsel of the Federal Reserve Board, 4 Fed. Res. Bull. 1123 (1918), claiming that it demonstrates an attempt by the Board to "insulate the domestic banking system and 'the interests of the parent bank' from sovereign risk." It does nothing of the kind. In that bulletin, the General Counsel opined that foreign branch deposits were exempt from reserves since, due to geographic constraints and differences in local currency, the Federal Reserve Banks could not provide offshore branches with emergency cash in the event of a run on the branch. But the General Counsel specifically noted that even though foreign branch deposits were

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Citibank's examples do not purport to govern the allocation of risk between a bank and its depositors. Rather, they simply provide a set of rules for determining whether or not a bank is required to maintain reserves or pay insurance assessments for any given deposit. Indeed, they expressly leave it to the parties to allocate sovereign risk between themselves. *E.g.*, 12 C.F.R. § 204.128(a), App. 88a:

> In accepting deposits at branches abroad, some depository institutions may enter into agreements from time to time with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment.

The thrust of existing statutes, regulations and rulings is that, once the parties have contractually agreed on how to allocate risks, then certain reserve and deposit insurance consequences flow from the terms of their agreement.

Citibank turns this cause and effect relationship on its head. Citibank argues that its own unilateral treatment of WFAL's deposits for reserve and FDIC insurance purposes means that WFAL must have assumed sovereign

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exempt from reserve requirements, the bank's obligation under the deposit contract was *not* limited to the assets of the offshore branch. To the contrary, "there is no separate corporate entity as between the parent bank and its branch. A deposit liability of the branch is, therefore, a liability of the parent bank . . . . " *Id.*

risk. That is not the case. When Citibank's argument is unraveled, it is clear that Citibank urges the untenable conclusion that the depositor bears sovereign risk as a matter of federal law, even though the language upon which Citibank relies expressly leaves that allocation of risk to the parties.

In short, the statutes, regulations and rulings cited by Citibank do not even begin to provide the basis for federal preemption set forth in *Northwest Central Pipeline Corp. v. State Corporation Comm'n.*, 489 U.S. 493 (1989),[9] for they do not purport to govern any aspect of the contractual relationship between the bank and its depositor – much less "to occupy the entire field" heretofore left to the states.

Citibank argues that the reserve treatment and insurance status of foreign branch deposits are *"predicated"* on certain *"assumptions"* and *"understandings"* regarding how certain risks are allocated between the parties under

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[9] As this Court has stated, the test for preemption is:

> In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

Northwest Pipeline, supra, 489 U.S. at 509 (parallel and other citations omitted).

the deposit contracts. Although this may well be true, those "assumptions" and "understandings" are relevant, if at all, only to Citibank's claim that the federal government's interest in these matters is sufficiently strong to justify the creation of a federal common law. It is that issue to which we now turn.

II. There Is No Conflict Between Federal Law Or Policy And State Law That Would Support Application Of The Doctrine Of Preemption Or The Creation Of Federal Common Law.

What Citibank is really arguing is that this Court should create a new body of federal contract law limiting repayment to the assets of the branch. But, as the Court of Appeals held, and as we further demonstrate in Part A, there is no conflict between federal law or policy and state law that would justify the creation of a new body of federal common law. Similarly, even if the Court were to find that federal law existed in this area notwithstanding the discussion in Part I above, there is no conflict between federal law and state law which would warrant federal preemption. Moreover, as we demonstrate in Part B, this is not the appropriate forum for creating the law Citibank seeks.

A. This Court Should Not Reach Out To Create A New Body Of Federal Contract Law, Or Find Federal Preemption, That Would Limit A Bank's Repayment Obligation To The Assets Of The Deposit-Taking Branch.

Ever since the demise of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), federal courts create common law only in

"a few areas, involving 'uniquely federal interests.' " *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988), quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). When state law and federal law and policy are in harmony and the latter does not frustrate or conflict with the operation of the former, neither preemption nor the creation of federal common law is appropriate. In order to conclude that federal law has preempted state law or to establish a basis upon which to create federal common law, there must be a significant conflict between federal law or policy and state law. As Justice Harlan wrote for the Court in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966):

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions . . . among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, . . . it must be remembered that "Congress acts . . . against the background of the total *corpus juris* of the states . . . . " Hart & Wechsler, *The Federal Courts and the Federal System* 435 (1953).

Citibank acknowledges as much: it bases its plea for preemption on the argument that "local law . . . is preempted because it 'conflicts with federal law,' *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988), and

'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." Pet. 25.

Thus, the controlling question is, has Citibank shown a "significant conflict" between state law and federal law or policy. The Court of Appeals provided a complete answer. It held that Citibank has not shown any such conflict, much less a significant one, between federal law or policy and state law. *See* WFAL 2d Cir. II, App. 10a.

The Court of Appeals first noted that Citibank relies on 12 C.F.R. § 204.128 (1991), App. 88a-89a (the "1970 Board Interpretation"),[10] to argue that there is a clear federal policy placing the risk of foreign-law impediments to repayment on the depositor. The Court then pointed out, however, that under reserve regulations, the reserve status of a deposit, *i.e.*, whether it is to be exempt from reserves because it is "payable only at an office outside the United States," depends upon whether ". . . the depositor is entitled, *under the agreement with the institution*, to demand payment *only* outside the United States." (Emphasis the court's.) WFAL 2d Cir. II, App. 10a. From this the Court of Appeals concluded that as long as state law does not restrict the parties' ability to allocate risk by agreement, it does not conflict with federal law. *Id.*, citing *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31 (1977).

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[10] The 1970 Board Interpretation was removed from the Code of Federal Regulations in 1980 and was not restored until 1987, four years after the deposits in this case were placed. *See* 52 Fed. Reg. 47,693 (Dec. 16, 1987).

Citibank has attacked this conclusion primarily by arguing that the language in the regulation upon which the Court relied applies only to "sham" deposits and has no general application.[11] Pet. 14-18. Citibank's reading of the regulatory material is flawed. The regulation provides:

> "Any deposit that is payable only at an office located outside the United States" means (1) a deposit of a United States resident that is in a denomination of $100,000 or more, and as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States or (2) a deposit of a person who is not a United States resident as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States.

12 C.F.R. § 204.2(t), App. 87a.

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[11] Citibank's obvious concern that the Court's analysis of 12 C.F.R. § 204.2(t) is both correct and fatal to its defense is reflected in its mischaracterization of the Court's reading of the regulation. For example, Citibank states that the Court "read [the quoted] clause of 204.2(t) to mean that a deposit meets the requirement that it be payable 'outside the United States' only if the depositor's agreement with the bank contains a *specific written* provision" to this effect. (Emphasis added.) Pet. 15-16. Nothing in the Court of Appeals' decision supports this assertion. Compare WFAL 2d Cir. II, App. 10a. In addition, the trial court obviously recognized that understandings are incorporated into deposit agreements other than by "specific written provisions." See n. 12 below. Similarly, in its amicus brief to the trial court, the Federal Reserve Bank of New York explained that "the agreement between the parties need not be in writing." Memorandum of Law of Federal Reserve Bank of New York As *Amicus Curiae*, WFAL I, n. 18 and accompanying text.

As is evident, the regulation excludes deposits by U.S. residents under $100,000 from reserve-free status without regard to the terms of the agreement between the depositor and bank. The state-law restriction test relied upon by the Court of Appeals has no application to these small deposits by U.S. residents. However, the regulation goes on to grant reserve-free status to other deposits, *i.e.*, large deposits by U.S. residents and deposits of all sizes by nonresidents if, and only if, they satisfy the state-law restriction test. 12 C.F.R. § 204.2(t). Further, Citibank's attack on that language ignores the fact that it was taken virtually verbatim from, and is said to constitute a "codification" of, paragraph (c) of the 1970 Board Interpretation that constitutes the foundation upon which Citibank's entire federal policy argument is built.[12] *See* the amicus brief of the Federal Reserve Bank of New York, *supra* n. 9, text before n. 17, at 10.

Thus, Citibank has it backwards. While the language Citibank finds so objectionable does not apply to small deposits by United States residents, it does apply to all other deposits by residents and nonresidents alike, and was copied from and continues to appear in the present version of the 1970 Board Interpretation.

Given the harmony between state law and the reserve regulations, both of which look to the agreement of the parties to determine their respective rights and liabilities, there is no conflict, much less a "significant" one, between federal law or policy and state law. Citibank

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[12] "His agreement" was changed to "the agreement" and the words "the bank" were changed to "the institution." *Compare* 56 Fed. Res. Bull. 140 (1970) *with* 12 C.F.R. § 204.2(t).

does not challenge the Court of Appeals' holding that New York law "does not restrict a bank's freedom to enter into an agreement that allocates the risk of foreign sovereign restrictions." WFAL 2d Cir. II, App. 10a. Citibank has never demonstrated that reserve regulations operate to allocate sovereign risk. Indeed, *all* of the interpretations cited by Citibank expressly contemplate that the parties are free to allocate risk.[13] In the absence of a contrary agreement, New York law places the risk of foreign-law impediments on Citibank, not the depositor.

In sum, all of the applicable authority supports the Court of Appeals' holding that federal policy does not allocate sovereign risk to depositors as a matter of law, but instead contemplates that one must look to the agreement of the parties to determine who bears that risk.

Still searching for a conflict between federal law and state policy, Citibank contends that when the Federal Reserve exempted foreign branch deposits from reserve requirements and insurance assessments, it made certain "assumptions." Pet. 15-19. One of these assumptions was that, if the deposit contract did not provide otherwise, principles of state contract law would provide that "[a] customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes

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[13] *See, e.g.*, 12 C.F.R. § 204.128(c) (reserves are required if under its agreement with the depositor the bank has "guaranteed" repayment at the home office); 35 Fed. Reg. 2,768 (1970) (same); 1 Fed. Res. Reg. Serv. at 2-330 (Staff Op., Feb. 23, 1982) (same); *id.* at 2-521.1 (Staff Op., March 21, 1983) (same); *id.* at 2-330.1 (Staff Op., July 29, 1983) (same). Each of the three staff opinions in turn cite and rely upon 12 C.F.R. § 204.2(t), which is the regulation Citibank attacks.

whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." 12 C.F.R. § 204.128(c). Citibank argues that this assumption was incorrect: under state contract law, if the parties fail to specify otherwise, the deposit-taking bank must bear that risk. Accordingly, Citibank concludes there is a conflict between state law and federal "policy" which this Court should resolve by creating a new federal law. Pet. 23-25. Citibank's conclusion is wrong. Federal law is consistent with state law: both the Court of Appeals and the trial court found that under state law, the result would have been different if the Philippine government had "imposed restrictions on withdrawal" – for example, by actually expropriating the deposits. WFAL 2d Cir. II, App. 8a-9a; WFAL II, App. 45a; *see, e.g., Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, *cert. denied*, 469 U.S. 966 (1984). Since both lower courts also held that the Philippine government had not imposed any such "restrictions on withdrawal" here, and Citibank does not challenge this finding, there is no occasion for the creation of federal law.

In any event, there is no need to replace or supplement state law in order to enable the Board to implement its reserve regulations. The Board may condition reserve-free status in any manner it sees fit. Thus, if the Board actually believed that a deposit should be reserve-free only if the depositor bears risk associated with a bank asset portfolio, it could require the parties to include such a provision in the deposit agreement.[14] It has been more

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[14] Citibank has previously contended that it might not be possible to include a provision to this effect in its deposit

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than two years since Assistant Solicitor General Merrill acknowledged to this Court that no statute or regulation contains such a requirement. In the interim, neither Congress nor the Board has changed that state of affairs. These are certainly not the circumstances where this Court should grant the extraordinary relief of creating federal common law. As shown in Part B, for reasons of institutional competence, any change in the law in this area should be left to Congress or the Board.

B. Reasons of Institutional Competence Counsel Judicial Restraint: Any Needed Reform Should Be Accomplished by Direct Regulation or New Legislation.

Citibank seeks federal common law that will require sovereign risk to be allocated to foreign-branch depositors *in all deposit contracts under all circumstances*. If there

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agreements. This is a factual question the trial court resolved against Citibank:

> Although it is not for me to tell you how to practice law and do things, it seems to me that it would be a dead cinch, you are dealing with a very small number of people, small number of banks, small number of brokers, and it seems to me that it would be a dead cinch for Citibank to publish their views in such a way that no one in that small community could realistically say he wasn't aware of it when making a deposit.

J.A 38. For example, potential depositors could be required to acknowledge a memorandum of terms before Citibank's funding computer would authorize its money traders to accept deposits from them, just as these traders must confirm banks' creditworthiness before they place funds with them.

is to be federal law in this area, it should be established by Congress or the Federal Reserve Board. This case is far afield from the traditional circumstances in which courts have created federal common law. Usually, existing federal law powerfully informs the need for and content of the proposed federal common law. Here, the claimed federal interest and policies remain at a high level of abstraction.

Congress is far better equipped to debate the relative merits of the policy considerations that Citibank raises. These policy debates must also account for countervailing considerations, for example the consequences of upsetting existing contracts and departing from existing market practices; the utility of imposing Citibank's proposed rule onto an international market; and the belief by many bankers that the rule Citibank proposes would actually place United States banks at a competitive disadvantage.

This Court is ill-equipped to balance these policy considerations. The international implications should be settled by the Executive Branch. *See Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The weighing of domestic and regulatory considerations falls within Congress' special province. As explained in *United States v. Gilman*, 347 U.S. 507, 511-13 (1954):

> The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

In matters such as this, courts properly defer to the superior lawmaking abilities of other branches. *Bush v.*

Lucas, 462 U.S. 367, 390 (1983). So should this Court, for reasons of institutional competence. If rules regarding the allocation of sovereign risk are to be adopted, it should be done prospectively, and only by Congress or the Federal Reserve Board. This Court should deny review since the narrow decision of the Court of Appeals involves only a simple contract dispute under state law.

Indeed, recent actions by the Federal Reserve Board suggest that even the United States acknowledges that if changes in existing law are necessary and appropriate, they can best be achieved by the combined action of Congress and the Federal Reserve Board. As part of the recent legislation dealing with the savings and loan crisis, ultimately enacted on November 26, 1991 as the Federal Deposit Insurance Corporation Improvement Act of 1991, the Board proposed a provision which would have authorized the Board to do what Citibank asks this Court to do, i.e., allocate sovereign risk between banks and their depositors. Senate bill S.543 § 1131. It is telling that Congress omitted that provision from the legislation it actually adopted just weeks ago.

While the Board may choose to resubmit its proposal when Congress reconvenes, the fact that Congress has recently considered such legislation, and may do so again in the near future, robs this case of any significance. There is simply no reason for this Court to jump into the fray. Legislation either will or will not pass. If it passes, the legal conclusions this Court may reach here will obviously be of little significance, for in Citibank's words, "the legislation w[ill] resolve the issue of liability arising out of *future* action of foreign governments." Citibank Application For Extension Of Time, September 5, 1991, at

4. If it fails to pass, this will suggest, if anything, that Congress does not share Citibank's concerns and is content with the conclusions reached by the long line of cases of which the instant case is the most recent. Either way, there is nothing here which makes this fact-bound contract case certworthy.

III. Citibank's Failure To Seek Permission To Repay With Philippine Assets Is Fatal To Its "Impossibility" Defense.

In addition to rejecting Citibank's "federal law" arguments, the Court of Appeals found an independent state ground for affirming the judgment in WFAL's favor: Citibank failed to satisfy its good faith obligation to seek permission from the Philippine Central Bank to repay WFAL's deposits. WFAL 2d Cir. II, App. 10a-11a. That failure completely invalidates Citibank's "impossibility" defense – even if this Court were to create a new federal law limiting Citibank's repayment obligation to its Philippine assets. Neither Congress nor the Board, the bodies properly charged with considering the new rule of law Citibank proposes, could save Citibank from its predicament in this case. If a new rule of law or regulation allocated sovereign risk to the depositor in these circumstances, Citibank would still remain liable here because it never even sought permission to repay. Thus, Citibank's plea for federal common law is moot, for it would not alter the outcome of this case. This Court does not sit to render advisory opinions. As the trial court held,

> When the "government or other restraint does not render performance absolutely impossible, it is the duty of the promisor to make a bona fide

> effort to dissolve and be relieved of the restraint which operates to prevent his performance." *Brown v. J.P. Morgan* . . . .

WFAL II, App. 47a. *See also* WFAL I, App. 61a.

Citibank does not claim that it sought permission to repay its deposits with Philippine assets. Instead, it makes the speculative claim that approval to pay with branch assets would have been denied if sought. The Court of Appeals was not persuaded by this argument. As demonstrated above, new evidence reveals that Citibank has remitted over $160 million in Philippine branch assets to its home office as "profits" during the period in which those assets were allegedly "frozen" by the Philippine government. The Court of Appeals noted, "Citibank does not dispute that it received these profits. . . ." WFAL 2d Cir. II, App. 11a. This strongly suggests that if Citibank had made a good faith effort to obtain Central Bank approval to use Philippine assets to repay the deposits, such approval would have been forthcoming. *See also* J.A. 91-92, 95-96.

As the Court of Appeals held, it is unnecessary to resolve the question of whether Central Bank approval would have been granted. Under controlling legal principles, courts will not speculate as to the likely outcome of such a request.[15] Rather, "the burden of establishing the

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[15] This is true even if the party asserting the defense can show that permission would almost certainly have been denied if sought. *See, e.g., Paramount Pictures, Inc. v. Sparling*, 93 Cal. App. 2d 768, 774-776, 209 P.2d 968, 972, 973, *cert. denied*, 339 U.S. 953 (1950). In that case the court, applying New York law,

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nature, extent and causative effect of [an] alleged impossibility is invariably held to be upon the party asserting it." S. Williston, *Contracts* (3d ed. 1978) at 272. Accordingly, Citibank's failure to seek Central Bank approval to repay WFAL's deposits is fatal to its "impossibility" defense. As the Court of Appeals concluded:

> [W]e note that . . . Citibank . . . has received profits of at least $25 million from Citibank/Manila during the period 1984-1989 . . . . Citibank does not dispute that it received these profits . . . . Suffice it to say that Citibank's acknowledged ability to obtain Philippine Central Bank approval of transfers to it of moneys as profits appears to support the district court's finding, if further support were needed, that Citibank . . . did not satisfy its good faith obligation to seek that government's approval of repayment of WFAL's deposits . . . .

WFAL 2d Cir. II, App. 10a-11a.

In its Petition, Citibank fails to mention these embarrassing facts, much less explain them. Citibank does not

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held that a bank's failure to repay a deposit was not excused when it failed to take an appeal from a freeze order even though it showed that such appeals were routinely rejected. *Accord, Fujikawa v. Sunrise Soda Works, Co.*, 158 F.2d 490, 493-4 (9th Cir. 1946), *cert. denied*, 331 U.S. 832 (1947) (relying on New York law); *Baer American Banking Corp. v. Kattan*, 82 Civ. 5834, slip op. (S.D.N.Y. 1984); *Saul v. DeKoenigsberg*, 147 N.Y.S.2d 396, 399 (Sup. Ct. N.Y. 1955); *Brown v. J.P. Morgan*, 177 Misc. 626, 31 N.Y.S.2d 323, 334 (Sup. Ct. N.Y. Cty. 1941), *rev'd on other grounds*, 265 App. Div. 631, 40 N.Y.S.2d 229 (1st Dep't 1943), *aff'd*, 295 N.Y. 867, 67 N.E.2d 263 (1946).

challenge this part of the Court of Appeals' holding, which is independently dispositive. Citibank's concession that it failed to seek Philippine Central Bank approval to repay WFAL's deposits, especially in light of the $160 million in repatriated "profits," eviscerates any "impossibility" defense. For this reason alone, the Court should deny *certiorari* because "plenary review" in this type of case is not a "wise use of [this Court's] limited judicial resources." WFAL S. Ct., App. 25a.

CONCLUSION

Citibank's petition should be denied.

Respectfully submitted,

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APPENDIX A

EXHIBIT A

PROFITS OF CITIBANK'S PHILIPPINE BRANCH OPERATIONS TRANSFERRED TO CITIBANK'S HEAD OFFICE 1985-1989

		Amounts Transferred	
Philippine Branch Unit	*Year*	*Pesos*	*US Dollars*
Foreign Currency Deposit Unit (FCDU)	1989	158,690,000	7,289,389
FCDU	1988	369,038,000	17,827,922
Regular Banking Unit (RBU)	1989	499,452,000	22,942,214
RBU	1988	105,953,000	5,118,502
RBU	1987	473,821,000	22,856,777
RBU	1986	645,631,000	31,387,019
Combined RBU and FCDU	1985	1,044,788,000	55,235,950
TOTAL PROFITS TRANSFERRED		P 3,397,373,000	US $162,657,773

Sources of Data: Citibank NA-Philippine Branches, audited financial statements, years 1985 through 1989. Exchange rates used to calculate equivalent U.S. dollar amounts are year end rates from quotations published in the Wall Street Journal